No. 13890

In the United States Court of Appeals for the Ninth Circuit

CONSOLIDATED FREIGHTWAYS, INC.,
a corporation,

Appellant,

vs.

UNITED TRUCK LINES, INC.,
a corporation,

Appellee.

PETITION FOR REHEARING ADDRESSED TO CIRCUIT JUDGES BONE, ORR AND CHAMBERS

Appeal from the Order of Dismissal of the District Court of the United States for the District of Oregon
HON. GUS J. SOLOMON, Judge

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STATEMENT

The Court has decided against appellant's appeal on both grounds urged in our brief. For convenience we shall deal with the Court's Opinion of October 19, 1954, in this petition for rehearing in the same order in which the Opinion

dealt with the points raised in appellant's brief. This petition is filed and counsel's certificate is appended, all as provided in Rule 23 of this Court, effective May 27, 1953.

APPELLANT'S FIRST POINT

We believe that, in ruling adversely to appellant on its first point, the Court's opinion fell into three errors. The first was that Part II of the Interstate Commerce Act is a "* * * wholly independent legislative enactment in which Congress deliberately elected to provide no remedies for violation of any of its provisions other than those carefully spelled out in Part II itself." (Op. 4; see also, second full para. p. 7) The second error was that appellant failed to state a federal question because it relied only upon a "privilege," not upon a "right". (Op. 5-6) Finally, the Court concluded that appellant's complaint was really seeking to establish a claim of "unfair competition" and that it wasn't really relying upon appellee's violation of the Interstate Commerce Act (Op. 6).

Concerning the first error, it was not appellant's point on oral argument, as the Court says, that Secs. 8 and 9 of Part I were incorporated in Part II (Op., beginning at the bottom of p. 3). What appellant was then contending is that when Congress added Part II to the Act in 1935, it did it not by a separate piece of legislation but by *amending* the original 1887 Act. This conclusion is inescapable since Sec.

301 of 49 U.S.C.A. says that Part II amends the entire Act. In the official volume of the Federal statutes (49 Stat. 543) the amending language reads as follows:

> "* * * that the Interstate Commerce Act, as amended, herein referred to as 'Part I', is hereby amended by inserting at the beginning thereof the caption, 'Part I', and by substituting for the words 'this Act', wherever they occur, the words 'this part', but such Part I may continue to be cited as the 'Interstate Commerce Act', and said Interstate Commerce Act is hereby further amended by adding the following Part II:"

We agree that the effect of Secs. 8 and 9 is limited to Part I (Footnote 1, p. 4). This is necessarily so because these *sections* deal with violations of that *Chapter* (1) only. Nevertheless we ask the Court to reconsider its view that Part II (Chapter 8) is separate for, if it concludes Part II is an amendment, as we think it must, then *Fratt* v. *Robinson* applies. In this connection, though maintaining that Part II is *separate* (first full para. p. 4, second full para. p. 7), the Court later says that Part II is an "amendment" (first full para. p. 8). If the Court becomes convinced that by amending the Act Congress intended it to be read as a whole, then it seems clear that *Fratt* v. *Robinson* becomes applicable. We have here, as in *Fratt,* a situation where damages may be collected for the violation of one section of the Act where the section violated provides for no rights for damages

though other sections do. Applied here that principle means that a violation of Chapter 8 permits an action for money damages because Secs. 8 and 9 permit such actions for violations of Chaper 1.

What we think is the Court's second error involves *Bell* v. *Hood*. That opinion states a broader principle than the *Fratt* case. It is that a complaint, seeking money damages for a violation of a federal right raises a federal question even though the right is silent as to *any* money damages for its violation. This Court disposes of the *Bell* case by saying that "rights" were involved there whereas in this case there is only a "privilege". We frankly do not see the application of this distinction. This Court correctly interprets the *Bell* opinion to mean there was a federal question because Bell claimed his "rights" had been subjected to unreasonable searches and seizures as prohibited by the Fourth and Fifth Amendments. We'll assume with the Court that appellant's certificate is a "privilege" not a "right". We submit, however, that this assumption is no reason for saying that appellant may not protect it by suing for money damages. This is the problem before the Court, and we respectfully ask the Court to consider that the problem is not solved by describing what appellant has as a "privilege". (Op. 5-6)

The Court's final error on appellant's first point is that appellant was not really basing its claim upon the federal statute. We are unable to reconcile the Court's statement

(Op. 6) "* * * still it does not clearly appear that the complaint was 'drawn so as to claim a right to recover under the Constitution and laws of the United States' or that appellee's alleged violation of the Motor Carrier Act forms the 'sole basis of the relief sought' ", with the Court's summary of appellant's complaint (1) that it "* * * charged appellee with a breach of the Interstate Commerce Act by transporting property * * *" (p. 6) and (2) "appellant held a certificate", "that appellee did not hold a certificate" (p. 2, first para.).

Our recollection is that Judge Orr correctly suggested upon oral argument that there is no language whatever in the complaint (Tr. 3-6) urging any theory other than a violation to appellant's damage of the certificate provisions of the Interstate Commerce Act, Part II. Despite the complaint and the Court's summary of it, the opinion concludes that the real basis of the suit is "unfair competition" relying for this, not upon the text of the complaint but upon appellant's memorandum to the trial court urging it was entitled to recover because appellee had engaged in business in violation of law. Appellant did not urge unfair competition either in its complaint or in its memorandum to the trial court.

The complaint and the memorandum did claim appellee had violated the Act to appellant's damage. One does not need the violation of a statutory prohibition against doing

business without prior permission to set up a claim of unfair competition. If I palm off my inferior cigarettes as "Lucky Strikes" (the classical type of unfair competition case, see 3 Restatement of Torts Ch. 35, beginning at p. 534), the manufacturer of Luckies doesn't have to show I violated a statute. Here, had it not been for the Interstate Commerce Act, Part II, appellee could have operated over the highway in question as much as it pleased and it would not have been unfair competition for it to do so. It does not make it "unfair competition" for appellee to operate in violation of the Act. All appellant is claiming is that appellee violated the Act to its damage, not that it unfairly competed with appellant. We submit that the complaint relies solely on the violation of the Act despite the trial court's generalization that appellant was relying on the "common law" (Tr. 15), and this Court's particularization that appellant relies upon "unfair competition." Moreover, even if the memorandum had relied on the common law, the problem before the trial court and this Court would be whether the *complaint* raised a federal question, not what the memorandum said about it. *The Fair* v. *Kohler Die Co.,* 288 U. S. 22.

APPELLANT'S SECOND POINT

We contended in our brief, as the Court correctly points out on page 2 of the Opinion, that the Motor Carrier Act,

by reserving common law remedies, created a federal right cognizable in a district court as a federal question. In its discussion of appellant's first point, the Court identifies the particular common law remedy sought by the complaint as one based upon "unfair competition" (Op. 6). While, as we have pointed out above, we do not agree with this construction, we shall now assume that the Court is correct in characterizing appellant's cause of action as being a common law one based upon unfair competition.

In its discussion of appellant's second point, the Court seems to recognize correctly that Sec. 22 of the original Interstate Commerce Act reserving common law remedies was, in fact, carried over by Sec. 317(b) of the Motor Carrier Act to become an integral part of the Motor Carrier Act. This conclusion, which is what we think the Court meant, is necessarily correct since Sec. 317(b) of 49 U.S.C.A., quoted by the Court admits of no other possible conclusion. We want to emphasize the effect of Sec. 317(b), however, because the second paragraph of the Court's opinion on appellant's second point, that is, the paragraph beginning at the bottom of p. 7 and carrying over to the top of p. 8, stresses that Sec. 22 dealt only with carriers *"other than* motor carriers" and *"only to carriers other than motor carriers"*. These italicized phrases which are the same as those the Court italicized, create some doubt in our minds as to the Court's meaning.

With this preliminary out of the way, we'll now assume that appellant seeks by its complaint to recover on a cause of action based upon unfair competition and that Sec. 22 is *in toto* a part of the Motor Carrier Act. We know that the Court believes the action is for unfair competition, and except for the italics, we feel confident that the Court agrees that Sec. 22 is a part of the Motor Carrier Act.

Even so, the Court has decided that the claim noted may not be asserted in a federal court. The first basis for this ruling is that appellant has not cited to the Court any authority applying "* * * orthodox common law remedies against the carriers covered by Chapter I of the Interstate Commerce Act in any instance where *unfair competition* between carriers in the securing of business was the basis of a demand for relief * * *" (Op. 8-9, emphasis the Court's). We must say we do not see how such a claim could ever have been litigated so far as railroads are concerned. The complaint in this action says that appellee operated over a highway it was not authorized to serve, thereby diverting business from appellant which had the right to serve the highway in question (Tr. 3-6). Since railroads, of course, have separate rights of way, it is hard to see how this situation could possibly have come up under Part I (the railroad section) of the Act.

The Court then goes on, on p. 9 of the Opinion to point out correctly that appellant attached copies of complaints

to its brief, which complaints involved actions against the Pennsylvania Railroad for refusal to furnish cars. The Court incorrectly, however, says that the "* * * outcome of the litigation in these state cases is not shown * * *" and it also incorrectly holds that "* * * Chapter I of the Interstate Commerce Act specifically prohibited the above noted practice * * *" (Op. 9). The central error of the Court's opinion on the common law point is the last sentence in the third from the last paragraph of the Opinion and the next to last paragraph in the Opinion (p. 9). For convenience we quote this language as follows:

> "Even though a common law remedy invoked in a state court might have ultimately been judicially held to be available to shippers denied sufficient coal cars, by an interstate rail carrier, it must be pointed out that the *right* to cars directly arose under federal law.
>
> "In the case at bar, appellant concedes that no statutory right to a common law remedy for damages for alleged 'unfair competition' of a motor carrier is preserved, as is (and was) the *statutory right* of shippers in 1908 to have coal cars provided by a railroad common carrier." (Emphasis the Court's).

We can see how the Court arrived at the result it did if the assumption involved in the above quotation is correct; that is to say, if the right to cars was conferred by the Federal statute, it is easy to see that an alleged violation of those rights would give rise to a federal cause of action.

However, the principal case we relied on, together with the complaints attached to our brief, make it perfectly clear that *there was no federal statutory right to cars when the complaints were filed.* On page 14 of our brief we cited the Supreme Court in *Pennsylvania R. R. v. Sonman Coal Co.,* 242 U. S. 120, at p. 124, as follows:

> "* * * a claim for damages for failing upon reasonable request to furnish to a shipper in interstate commerce a sufficient number of cars to satisfy his needs, may be enforced in either a *Federal or a State Court* * * * whether the carrier's default was a violation of its *common law duty* existing prior to the Hepburn Act of 1906, or of the duty prescribed by that Act * * *." (Emphasis supplied.)

Turning to page 42 of our brief which starts a replica of the complaint in the *Sonman* case, we note on page 43, paragraph "Third" that plaintiff was relying upon the *Pennsylvania law and the common law.* Nowhere does the complaint mention the Federal law. Moreover, the complaint (Br. top p. 46) specifies that the time complained of was that between April, 1903, and April, 1908. The opening words of the opinion of the Supreme Court in the *Sonman* case point out that the cause of action started in 1903 (242 U. S. 120, 121).

The original Interstate Commerce Act of February 4, 1887 (24 Stat. 379), did not place upon an interstate carrier by rail any duty to furnish cars. The act was thereafter

amended in 1889, 1891 and 1903 (25 Stat. 855, 26 Stat. 743 and 32 Stat. 847). None of these amendments required the carriers to furnish cars. The duty to furnish cars was *first placed in the law* by the amendment of June 29, 1906, known as the Hepburn Act (34 Stat. 584). The duty to furnish cars was contained in the following language in the Hepburn Act:

> "Sec. 1. * * * and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, * * *" (34 Stat. 584 near bottom of page).

Accordingly, the Supreme Court in the *Sonman* case was dealing *not* with a federal right to receive cars, a right which this Court incorrectly assumed existed, but with a *common law* right to receive cars. It was not, therefore, dealing with a violation of the Act. In the *Sonman* case the Supreme Court held that the common law remedies reserved by Sec. 22 might be asserted in a State Court. By way of dicta, as the above quotation from the *Sonman* case shows, it said that such common law remedies could also be asserted in a Federal Court. Moreover, these dicta appear in *non-diversity cases,* as the complaints attached to our brief show and as we pointed out in our brief (pp. 16-18).

In conclusion, on appellant's second point, it is perfectly clear that the Supreme Court of the United States has said

by way of dicta that a common law remedy may be asserted in a Federal Court in a non-diversity case where the carrier breaches any common law duty. We submit that this leaves this Court with the problem whether this plaintiff (appellant), having proceeded on a common law theory (under the Court's Opinion), may assert such a theory in a Federal Court in a non-diversity case under the clear dicta in the *Sonman* case. So far we think the Court has wrongly decided that it may not.

CONCLUSION

The order of dismissal (Tr. 19-20) should be reversed and the case should be remanded to the District Court on one of the alternatives mentioned in our brief (p. 19).

Respectfully submitted,

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SCHAFER & CRONAN,
Attorneys for Appellant.

I hereby certify that the foregoing petition for rehearing is in my judgment well founded and it is not interposed for delay.

JAMES P. CRONAN, JR.,
Of Attorneys for Appellant.